SUPREME COURT, U. S.
FILED
OCT 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC. AND DRIVEX CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

IRVING M. KING,
RUSSELL WOODY,
THOMAS D. ALLISON,
Attorneys for Respondents.

COTTON, WATT, JONES, KING & BOWLUS,
Suite 4750—One IBM Plaza,
Chicago, Illinois 60611,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Statutes Involved 3

Statement of the Case 4

Argument 11

I. The Decision Below Is in Full Accord with N. L. R. B. v. Gissel Packing Co. 11

II. The Court and Board Below Correctly Evaluated Alleged Employee Misconduct 15

III. Petitioner Was Not Denied Due Process 17

Conclusion 18

TABLE OF AUTHORITIES.

Allou Distributors, Inc., 201 NLRB 47 (1973) 16

Arbie Mineral Feed Co. v. N. L. R. B., 438 F. 2d 940 (8th Cir. 1971) 13, 14

Artcraft Mantel & Fireplace Co., 174 NLRB 737 (1969) 16

Cascade Corp. v. N. L. R. B., 466 F. 2d 748 (6th Cir. 1972) 16

Daniel A. Donovan, 206 NLRB No. 108 (1973) 16

Dawson Metal Products, Inc. v. N. L. R. B., 450 F. 2d 47 (8th Cir. 1971) 14

Fremont Newspapers, Inc. v. N. L. R. B., 436 F. 2d 665 (8th Cir. 1970) 14

Laura Modes Co., 144 NLRB 1592 (1963) 16

N. L. R. B. v. Arkansas Grain Corp., 390 F. 2d 824 (8th Cir. 1968) 14

N. L. R. B. v. Blades Mfg. Corp., 344 F. 2d 998 (8th Cir. 1965) 14

N. L. R. B. v. Crystal Tire Co., 410 F. 2d 916 (8th Cir. 1969) 14

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939) 17

N. L. R. B. v. Gissel Packing Co., 395 U. S. 575 (1969) 3, 9, 11, 13, 14

N. L. R. B. v. United Mineral & Chemical Corp., 391 F. 2d 829 (2nd Cir. 1968) 16

N. L. R. B. v. World Carpets of New York, 463 F. 2d 57 (2nd Cir. 1972) 16

Pacific Abrasive Supply Corp., 182 NLRB 329 (1970) .. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-346.

FEDERAL PRESCRIPTION SERVICE, INC. AND DRIVEX CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

OPINIONS BELOW.

The Decision of the Administrative Law Judge (Petition, pp. A35-A118) and the Decision and Order of the National Labor Relations Board (Petition, pp. A19-A34) are reported

at 203 NLRB No. 145. The opinion of the Court of Appeals for the Eighth Circuit (Petition, pp. A5-A18)[1] is reported at 469 F. 2d 813.

Respondents Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Local P-1149, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as "the Union"), were Intervenors and Cross-Petitioners in the review proceeding before the Court of Appeals for the Eighth Circuit, and were Charging Party and Petitioner, respectively, in the consolidated unfair labor practice and representation matters before the Administrative Law Judge and National Labor Relations Board.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

1. References to the Court of Appeals opinion as reprinted in the appendix to the petition shall be "C.A., p. . . . ." Similarly the Decision and Order of the National Labor Relations Board shall be referred to as "N.L.R.B., p. . . . ," and the Decision of the Administrative Law Judge as "Ad.L.J., p. . . . ."

QUESTIONS PRESENTED.

1. Whether the separate affirmative findings below of the Court of Appeals, National Labor Relations Board, and Administrative Law Judge as to the necessity of a bargaining order comply with the standards of this Court as set forth in *N.L.R.B.* v. *Gissel Packing Co.*?

2. Whether the Court of Appeals, National Labor Relations Board and Administrative Law Judge below dealt correctly with the allegations of employee misconduct resulting from Petitioner's illegal anti-Union campaign?

3. Whether the Administrative Law Judge's treatment of evidence with respect to alleged employee misconduct satisfied standards of administrative due process?

STATUTES INVOLVED.

Pertinent provisions of the National Labor Relations Act, as amended by the Taft-Hartley Act of 1947, 29 U.S.C. § 141, *et seq.*, are adequately set forth in the Petition.

STATEMENT OF THE CASE.

Petitioners Federal Prescription Service, Inc. and Drivex Co. (hereinafter referred to as "the Company") are mail order drug prescription companies located in Madrid, Iowa. Federal and Drivex are owned and operated by the same three men and are conceded to constitute a single entity for collective bargaining purposes.[2]

The Company's work force is composed principally of housewives and school girls working as regular full-time or regular part-time employees. At the time in question all employees received $1.60 an hour—the minimum permissible under federal law—with no paid vacations or paid holidays. The Company withheld no federal income tax, social security, or other deductions from the pay of many of these employees whom it denominated "contract" employees.

Employee Organizing Efforts.

On March 3, 1971 two employees, dissatisfied with their low wages and the Company president's refusal to consider any raises, drafted and circulated a petition requesting a raise of five cents per hour for older employees, plus paid vacations and holidays. The Company president immediately summoned a suspected originator of the petition into his office and interrogated her as to her responsibility (Ad.L.J., pp. A42-A48). This illegal interrogation was found to be an unfair labor prac-

2. A third corporation, Federal Vitamin Service, also located in Madrid, Iowa and owned and operated by the same three individuals, was also found to be included with the Company for collective bargaining purposes. Federal Vitamin Services, however, has no employees and is not named as a party in the proceedings below.

tice in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter referred to as the "Act").[3]

On March 5, 1971, the women employees met together after work across the street from the plant. The Company president immediately entered the meeting for the deliberate purpose of breaking it up, which he did. This interference and coercion with respect to their protected activity was found to be in violation of the Act (Ad.L.J., pp. A48-A50).

Following this meeting, the women for the first time contacted the Union, and an employee's meeting with Union representatives was scheduled for March 8, 1971 in the community room of the local fire station. Again, the Company president—this time accompanied by the vice-president—attempted to gain entrance to the meeting over the objection of the employees. This second attempt to interfere with and coerce the employees was also found to constitute a violation of the Act (Ad.L.J., pp. A50-A51).

Immediately following this meeting, the Company president changed the work hours, work stations, supervisors, and overtime possibilities of five employees, including the two women who drew up the March 3 petition, in order to eliminate any concerted activity on their part. Again, these actions were found to be an unfair labor practice in violation of Section 8(a)(1) of the Act (Ad.L.J., pp. A51-A57).

On March 15, 1971 the son-in-law of the Company vice-president, a salaried employee found to be acting as a Company spokesman, removed the telephone from the hook in an isolated area of the plant and called the employees there for a meeting at which he effectively promised that the employees' expectations would be fulfilled if they rejected the Union. This illegal interference with the Union organizational attempt was

3. Unless otherwise indicated, the unfair labor practices summarized herein were so found by the Administrative Law Judge, the National Labor Relations Board, and the Court of Appeals for the Eighth Circuit. Their findings are based on a hearing record of 1200 pages and are not now contested by Petitioner.

found to violate Section 8(a)(1) of the Act (Ad.L.J., pp. A59-A62).

Following these promises to the employees, the son-in-law importuned the employees to ask the Company president and vice-president to talk to them. The Company president met with the women and told them his hands were tied but asked for more time to work something out. The meeting lasted well beyond quitting time and the women were paid overtime for their attendance. This speech, set against the background of the earlier speech, was found to constitute an additional promise of benefit if the employees dropped the Union and an additional violation of the Act (Ad.L.J., pp. A59-A63).

The wife of the vice-president, a supervisor at the plant in her own right, was found to have engaged in continued interrogation of two employees as to Union activities. The interrogation concerned who was attending Union meetings, who had signed Union authorization cards, the personal feelings of individuals concerning the Union, the content of the different Union meetings, and the danger of job elimination upon unionization. These interrogations, without any assurance, were found to be an unfair labor practice under the Act (Ad.L.J., pp. A63-A69).

The wife of the vice-president was found to have committed a separate unfair labor practice in stating that if she could find out which employees were advising the Union of their personal knowledge of Company operations she could have them fired (Ad.L.J., pp. A65, A70).

Another unfair labor practice was found to have been committed by the Company's discriminatory enforcement of a so-called 'no-nonsense" rule. On many occasions Company officials monitored and dispersed in-plant employee discussions suspected of involving unionization. At the same time, anti-Union employees were permitted to hold meetings freely during work hours, some of which were even attended by the Company president (Ad.L.J., pp. A71-A75).

Evidence of additional unfair labor practices alleged to have occurred during this period of organization include:

1. Anti-Union and anti-organization statements by the Company president at meetings of employees called by him on Company premises on March 4 and March 10, 1971 (Ad.L.J.. pp. A57-A59);
2. The following of Union adherents around the plant by supervisory personnel (Ad.L.J., pp. A70-A71);
3. Introduction of the Company attorney by the Company president at an anti-Union meeting as a "neutral person" and former Board employee (Ad.L.J., pp. A71-A73);
4. An anti-Union employee took notes at Union meetings and reported directly to the office of the Company president the morning after each meeting (Ad.L.J., pp. A81-A82).

The Union's Demand for Recognition.

At the Union meeting of March 9, 1971, 35 employees signed authorization cards in favor of the Union. Another employee signed a card on March 15, 1971. A Union demand for recognition was received by the Company on March 15, 1971 and denied on or about March 17, 1971. The Board found that the collective bargaining unit consisted of 65 employees on March 15, 1971.

It is undisputed that on March 15, 1971, the date of receipt of the Union's demand for recognition, a majority of Company employees in the collective bargaining unit had signed valid Union authorization cards (Ad.L.J., pp. A103-A104).

The Discriminatory Discharges and Unfair Labor Practice Strike.

On April 2, 1961 the Company terminated ten employees, all but one of whom had signed the March 3 petition, had signed Union authorization cards, and had attended Union

meetings. The Administrative Law Judge found that the Company knew the dischargees to be Union adherents and that the employees were terminated as part of the Company's campaign "to meet the union organization head on and attempt to break it up" (Ad.L.J., p. A84). The National Labor Relations Board and the Court of Appeals confirmed the Judge's finding that the employees were discharged in order to discourage union activities and ordered them reinstated (N.L.R.B., pp. A20-A23; C.A., pp. A10-A13).

The following day a majority of the Company employees went on strike in protest against the discharge of the ten employees. The Company continued to operate the plant and obtained a state court injunction against mass picketing. On May 25, 1971, the employees through the Union offered to return to work unconditionally and to leave to the Board the processing of the unfair labor practice charges arising out of the April 2 discharges. On or about June 16, the Company responded by terminating three of the striking employees for alleged misconduct in connection with the strike.

The Administrative Law Judge found two of these three post-strike discharges to be in violation of Section 8(a)(3) and ordered the women reinstated (Ad.L.J., pp. A84-A87). The Board reviewed the matter and ordered all three reinstated (N.L.R.B., pp. A23-A26). The Court of Appeals found the failure to reinstate not to have violated the Act (C.A., pp. A13-A14).

The Election.

On April 20, 1971 the parties signed a stipulation for Certification Upon Consent Election. At the election 25 employees voted for the Union, 32 voted against the Union and 23 ballots were challenged, a number sufficient to affect the results of the election.

Of the 23 challenged ballots, 10 were cast by employees illegally terminated on April 2. The Administrative Law Judge

ruled that these should be counted and this order was affirmed by the Board and the Court of Appeals (Ad.L.J., pp. A84, A88; N.L.R.B., pp. A20-A23; C.A. pp. A10-A13). Of the remaining 13 challenged ballots, challenge to three were overruled by the Administrative Law Judge and this order was not disturbed by the Board or the Court of Appeals (Ad.L.J., pp. A90-A97). The remaining ten challenges, all of which were made by the Union, were upheld by the Administrative Law Judge, and confirmed by the Board and Court of Appeals.

The Bargaining Order.

The Administrative Law Judge, after an extended analysis of all of the matters described above, found: 1) that at the time of the demand the Union represented a majority of the employees in the appropriate collective bargaining unit (Ad.L.J., pp. A103-A104); 2) that the Company's course of conduct was a deliberate attempt to destroy the Union and included unfair labor practices both before and after the filing of the petition for an election and before and after the election itself (Ad.L.J., pp. A84, A104); 3) that these practices tended to undermine the Union's majority strength and impede the election (Ad.L.J., p. A104); 4) that the Company had not shown a willingness to comply with the Act, and nothing in the record would show a greater future willingness to recognize and bargain with the Union (Ad.L.J., p. A107); 5) that this deliberate course of conduct rendered it improbable that the Board's traditional remedies would insure a fair rerun election (Ad.L.J., p. A104).

Accordingly, pursuant to *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Administrative Law Judge found "that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order" (Ad.L.J., p. A104, quoting *Gissel, supra*), and recommended that the Company be ordered to recognize and bargain with the Union.

The National Labor Relations Board, upon a review of the entire record, upheld the findings of the Administrative Law

Judge, found the repeated violations of the Act to be of a "persuasive and aggravated character," and issued the recommended bargaining order (N.L.R.B., pp. A27-A28).

The Court of Appeals for the Eighth Circuit compared the record evidence to this Court's criteria in *Gissel, supra,* and found that the record supported a finding not only that the Union had represented a clear majority of the employees, but that the Company's course of conduct was of such a persuasive and aggravated character that a fair election was precluded and a bargaining order necessary.

ARGUMENT.

I.

THE DECISION BELOW IS IN FULL ACCORD WITH N.L.R.B. v. GISSEL PACKING CO.

In *N.L.R.B.* v. *Gissell Packing Co.*, 395 U.S. 575 (1969) this Court held (395 U.S. at 610, 614-615):

> Remaining before us is the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside.
>
> * * * * *
>
> [T]he Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The requirements and standards of *Gissel* have been recognized and followed by each and every tribunal in this proceeding. As indicated in the Statement of the Case, *supra* p. 4, the Administrative Law Judge exhaustively examined the evidence before him and explicitly found that the "substantial coercive conduct" before and after the filing of the petition, evidenced by the finding of substantial repeated violations of Section 8(a)(1) of the Act, and highlighted by the illegal discharge of ten employees, "is of such a substantial nature that it is improbable that its effects in employees' minds could be

erased by the Board's normal remedial orders" (Ad. L.J., p. A99). The Administrative Law Judge further found that the Company's course of action includes unfair labor practices beginning on the first day of spontaneous employee organization and continuing until after the election "which have a tendency to undermine the Union's majority strength and impedes the election process and renders it improbable that the Board's traditional remedies would insure a fair rerun election" (Ad. L.J., p. A104).

The National Labor Relations Board reviewed the evidence and reached the same decision as the Administrative Law Judge (N.L.R.B., p. A27):

> Based on the entire record, including the Respondent's conduct violative of Section 8(a)(1) of the Act before and after the filing of the petition, and particularly the Respondent's discriminatory discharge of 10 employees after the strike in violation of Section 8(a)(3) of the Act, we find that the Respondent's violations of the Act not only precluded a fair election, but were of such a pervasive and aggravated character as to warrant the finding which we now make, that an order directing the Respondent to bargain with the Union is necessary to repair the unlawful effects. The aforementioned conduct has undermined the Union's majority and caused an election to be a less reliable guide to the employee's free choice than the signed authorization cards by which they designated the Union to represent them.

Finally, the Court of Appeals for the Eighth Circuit reached the same determination based upon its own separate analysis of the record (C.A., pp. A14-A15):

> On March 15, the date on which Employer received the Union's request for recognition, the Union held valid authorization cards signed by 36 employees of the 65 employees in the bargaining unit. The Board not only found that the Union held a clear majority, but determined that Employer's activities were of such a "pervasive and aggravated character" that a fair election was precluded and a

> bargaining order was necessary. This record supports that determination. The repeated interference with the employees' protected rights in violation of § 8(a)(1), and in particular the discharge of the ten employees in the face of the election justifies the Board's finding that a bargaining order should issue in this instance.

At each stage of this proceeding—before the Administrative Law Judge, the Labor Board, and the Court of Appeals—Petitioner has argued against a bargaining order. Each tribunal analyzed the evidence against the standards of *Gissel* and reached the same finding: the deliberate and repeated Company unfair labor practices were of such a pervasive and aggravated character that a fair election was precluded and a bargaining order necessary.

Recognizing its inability to fault the Board and the Court of Appeals for their full compliance with the tests of *Gissel*, Petitioner attempts to disparage the Eighth Circuit's review of Board bargaining orders by attacking its decision in *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (1971). In *Arbie*, the Eighth Circuit stated in dictum that where the record is silent with respect to the actual impact of the employer's unfair labor practices, the Court will defer to the Board's exercise of discretion and grant enforcement.

Whatever quarrel the Company may have with the *Arbie* approach, and Respondent believes it an appropriate method of administrative review,[4] it is absolutely irrelevant to the present case. In the instant case, the Court of Appeals affirmatively

4. It is relevant to point out that the Supreme Court in *Gissel* stated the same policy of deference to the Board's determination of such impact (395 U.S. at 612, n. 32):

> It is for the Board and not the courts, however, to make that determination [as to the necessity of a bargaining order], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 USC § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

found—like every other tribunal—that the record of repeated Section 8(a)(1) violations and illegal discharges supports and justifies a finding of coercive course of conduct precluding a fair election and necessitates a bargaining order.

Moreover, Petitioner's attempt to portray the Eighth Circuit as a mere rubber stamp for a Board bargaining order insults the record of that court. The Court of Appeals for the Eighth Circuit has in every review of a bargaining order given special scrutiny to the record before the Board and reversed the Board without hesitation when faced with a failure of proof as to the likely irremediable impact of the unfair labor practices on a rerun election. *Dawson Metal Products, Inc.* v. *N.L.R.B.*, 450 F. 2d 47 (8th Cir. 1971); *Fremont Newspapers, Inc.* v. *N.L.R.B.*, 436 F. 2d 665 (8th Cir. 1970); *N.L.R.B.* v. *Crystal Tire Co.*, 410 F. 2d 916 (8th Cir. 1969); *N.L.R.B.* v. *Arkansas Grain Corp.*, 390 F. 2d 824 (8th Cir. 1968); *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (8th Cir. 1971). See also *N.L.R.B.* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (8th Cir. 1965).

Finally, Petitioner speculates as to the unopened ballots of the twenty-three challenged voters, and contends that the possibility that the Union would have received as many votes at election in April as it had signed authorization cards in March shows that a fair election had been held. The argument is specious on its face. There is no evidence as to how many Union supporters were afraid to sign cards, nor is there any evidence as to the votes on the unopened challenged ballots. It is equally conceivable, based on the facts from which Petitioner speculates, that the Union would have received 60 votes on election day but for the Company's repeated unfair labor practice. Each tribunal below found that Petitioner's deliberately illegal policies were so aggravated and pervasive as to render a fair rerun election unlikely. Speculation as to unopened ballots in the first election cannot alter that finding. The decisions below are based on the evidence and in full conformance with this Court's decision in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

II.

THE COURT AND BOARD CORRECTLY EVALUATED ALLEGED EMPLOYEE MISCONDUCT.

Examination reveals Petitioner's bloody shirt of violence to be but a red herring. As described above, the Company deliberately engaged in a blatantly illegal campaign to destroy protected employee activity. This anti-Union campaign, begun at the first sign of spontaneous employee activity, continued throughout the period of employee organization, peaked in the illegal discharge of nine known Union adherents, and continued until after the Union election.

Against this proven record of unfettered illegal activity by the Company, the evidence of Union "violence" is minimal:

1. A single instance of mass picketing immediately following the illegal discharge of Union employees.
2. Two "car following" episodes, both occurring on a single day (J.A. pp. 223-233; 865-868).
3. An allegation of attempted damage to a trailer, which resulted in no damage and which the Administrative Law Judge, after receiving all of Petitioner's evidence, found to have been unconnected with either the Union or the striking employees (Ad.L.J., p. A108).
4. A single verbal threat by a woman on the picket line, on the day following the discharge of the Union adherents, which the Board found so insignificant as to order the women reinstated (N.L.R.B. pp. A23-A26).

That is *all* the evidence of "violence" which the Petitioner either introduced or offered for evidence in this matter. The Administrative Law Judge correctly categorized the extent of "Union violence" (Ad.L.J., p. A108):

> In the instant case the proffered evidence amounts to automobile following, mass picketing and a single verbal

threat. No physical assault took place; there was neither physical nor property damage.

None of these instances occurred during the period of Union organization; none of them occurred until after the Company's own illegal termination of employees suspected of supporting the union.

Contrary to the thrust of Petitioner's legal arguments, the policy of the Board and the courts is to refuse to issue bargaining orders, even if otherwise justified by the employer's unfair labor practice, where the union has used violence or other coercive organizing to obtain its authorization cards. See e.g., *N.L.R.B.* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829 (2nd Cir. 1968); *N.L.R.B.* v. *World Carpets of New York*, 463 F. 2d 57 (2nd Cir. 1972); *Laura Modes Co.*, 144 NLRB 1592 (1963); *Aircrafts Mantel and Fireplace Co.*, 174 NLRB 737 (1969); *Allou Distributors, Inc.*, 201 NLRB 47 (1973).

On the other hand, the Board with Court approval has issued bargaining orders, under the principles of *Gissel*, where the employer's unfair labor practices are found to be deliberate, pervasive and aggravated and the employee misconduct so limited and infrequent as not to resemble a course of conduct. Such a ruling has been held particularly justified where the episodes of misconduct followed receipt of the authorization cards, and could not there have been related to any organization coercion or to any company doubt as to the union's representative status. See *Cascade Corp.* v. *N.L.R.B.*, 466 F. 2d 748, 753 (6th Cir. 1972); *Pacific Abrasive Supply Co.*, 182 NLRB No. 48 (1970); *Daniel A. Donovan*, 206 NLRB 108 (1973).

To hold that the limited reaction of a few individuals—without any damage to person or property—to a deliberately illegal anti-Union campaign by the Company should bar the Union from the bargaining order found necessary to remedy

the Company's course of conduct would only urge the Company to greater excesses and reward it for its illegal actions. A company determined to prevent unionization at any cost could continue illegally to discharge, interrogate, discipline and otherwise coerce until some individual employee grew frustrated at the continued illegality and committed an isolated act of violence. The remedy of a fair rerun election would be eliminated, the union's legal majority dissipated, and the union forbidden to receive the bargaining order to which it is entitled. All incentive for such a company to forbear from illegal activity would be removed. The present policy of the courts and the Board, reflected in the present case, is closely attuned with this Court's decision in *N.L.R.B.* v. *Fanstell Metallurgical Corp.*, 306 U.S. 240 (1939), and its progeny and ought to be disturbed.

III.

PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner's claimed denial of due process is equally hyperbolic. Petitioner's evidence as to the alleged attempted damage to the trailer (J.A., pp. 740-745), car following incidents (J.A. 425-436, 486-494, 709-721, 730-733, 739-740, 865-867, 912-915), mass picketing (J.A. 457-459, 705-707), and an isolated verbal threat (J.A. 707-708, 726-727) was all admitted into the record and considered by the Administrative Law Judge. Evidence as to alleged employee misconduct in connection with the thirteen Section 8(a)(3) charges was admitted in full (J.A. p. 701). Evidence as to misconduct by employees not discharged by the Company was made by offers of proof following the admission by counsel for Petitioner that the most severe misconduct was the alleged car-following (J.A. pp. 701-703).

No grounds exist for Petitioner's claimed denial of due process.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for certiorari should be denied.

Respectfully submitted,

IRVING M. KING,
RUSSELL WOODY,
THOMAS D. ALLISON,
Counsel for Respondents.

COTTON, WATT, JONES, KING & BOWLUS,
Suite 4750—One IBM Plaza,
Chicago, Illinois 60611,
Of Counsel.

October 20, 1974.

LIBRARY
SUPR. CT. U. S.
No. 74-346
SUPREME COURT, U.S.
FILE

In the Supreme Court of the United States

October Term, 1974

FEDERAL PRESCRIPTION SERVICE, INC. AND DRUGS, CO., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Peter G. Nash
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC. AND DRIVEX CO., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The judgment of the court of appeals (App. A, *infra*, pp. 3-6) was entered on June 6, 1974.[1] The 90-day period for filing a petition for a writ of certiorari (see 28 U.S.C. 2101(c)) expired on September 4, 1974; petitioner did not

---

[1]Petitioner states (Pet. 2) that the judgment was entered on July 2, 1974. That, however, was merely the date on which the court of appeals issued a certified copy of the judgment (App. C, *infra*, pp. 9-10) pursuant to Rule 41(a), Fed. R. App. P. (see App. B, *infra*, p. 7-8).

obtain an extension of time for petitioning. The petition was filed out of time on September 26, 1974. Accordingly, the Court has no jurisdiction to entertain it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

NOVEMBER 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1362

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., INTERVENORS.

No. 73-1420

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

JUDGMENT

BEFORE: Van Oosterhout, Senior Circuit Judge, Lay and Stephenson, Circuit Judges.

THESE CONSOLIDATED CAUSES came on to be heard upon the petitions of Federal Prescription Service, Inc., and Drivex Co., and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al., to review an order of the National Labor Relations Board issued on May 31, 1973, against Petitioner, Federal Prescription Service, Inc., and Drivex Co., its officers, agents,

successors, and assigns, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 14, 1974, and has considered the briefs and transcript of record filed in these causes. On May 1, 1974, the Court being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Federal Prescription Service, Inc., and Drivex Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating in any manner with respect to their tenure of employment, or any term of condition of employment, because they engaged in concerted activity or activity on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization.

(b) Failing and refusing to bargain collectively in good faith with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive bargaining representative of all its employees constituting the unit herein found to be appropriate for the purpose of collective bargaining.

(c) Interrogating employees in a manner violative of Section 8(a)(1) of the National Labor Relations Act. (hereinafter called the Act)

(d) Promising employees benefits or improvements of working conditions as an inducement to refrain from becoming or remaining a member of the above-named Union, or any other labor organization, or threatening employees with discharge for engaging in union activities.

(e) Changing working conditions of its employees and restricting them in their activities in the plant, for the purpose of interfering with their concerted or protected union activities.

(f) Attending meetings of its employees held for the purpose of engaging in concerted or union activities.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in any other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Evelyn Burke, Geneva Battani, Marilyn Udorvich Cohn, Lois Geneser, Marjorie Nuser, John McCormick, Doris Novy, Beverly Storey and Jo Ellya Rathbun, priority reemployment in their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges previously enjoyed by them, and make them whole for any losses of pay they may have suffered, by reason of Respondent's discrimination against them, with interest at the rate of 6 percent.

(b) Upon request, recognize and bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive representative of all the employees in the bargaining unit described above and, if an understanding is reached, upon request embody such understanding in a signed agreement.

(c) Post at its plant in Madrid, Iowa, copies of the attached notice marked "Appendix".[1] Copies of said notice, on forms provided by the Regional Director for Region 18, (Minneapolis, Minnesota) after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Dated: June 6, 1974

Costs taxed in favor of Labor Board:

Costs of printing 25 copies of Labor Board's brief:	$334.30
Total costs of Labor Board for recovery from Federal Prescription Service, Inc.:	$334.30

[1The appendix to the judgment, which merely sets forth the notice the Board order required to be posted, is omitted.]

APPENDIX B

June 6, 1974

Messrs. Irving King
and Russell Woody
Suite 4750, One IBM Plaza
Chicago, Illinois 60611

Messrs. Paul S. Kuelthau
and Ronald K. Fisher
611 Olive Street
St. Louis, Missouri

Messrs. George J. Zazas
R.E. Highfield & G.H. Baker
1313 Merchants Bank Building
Indianapolis, Indiana 47204

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Robert J. Wilson
Regional Director, Region 18
118 South Fourth Street
Minneapolis, Minnesota 55401

Re: Nos. 73-1362/1420. Federal Prescription Service et al v. N.L.R.B.